

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2485/P1dn

PJK:kmg:rs

April 7, 2003

Notes 1 and 2 below accompanied the draft related to clarifying that use of the percentage standard is permissive in certain situations:

1. The delay in the initial applicability of ss. 767.085 (2) (b) and (2m) (a) 2., 767.45 (7), and 767.455 (6) is intended to provide time to update the documents that clerks of court provide showing the percentage standard and the factors considered for deviation from it.
2. Sometimes a change in the statutes related to child support is used as a "substantial change in circumstances" for an action to revise support under s. 767.32. Do you want to provide explicitly that this change (the change in proposed s. 767.25 (1r)) is not a substantial change in circumstances?

This would only be an issue for those cases in which the court determined that it was *required* to calculate support by using s. DWD 40.04, Wis. Adm. Code. I don't know how often that might have happened before the decision in *Randall*, or since that decision, so I don't know if there would be very many parties who would try to get support revised on the basis of the statutory change, placing a burden on the courts.

Notes 3, 4, and 5 below accompanied the draft related to requiring consideration of income disparity when establishing support:

3. This proposed change (in s. 767.25 (1m) (b)) may not accomplish what is wanted. Both the appeals court and the supreme court explicitly considered the disparity in the parties' incomes in the *Luciani* case. The supreme court left the support as originally ordered because Mr. Luciani did not show that, despite the disparity in the parties' incomes, ordering him to pay support based on the percentage standard was unfair to anyone, as s. 767.25 (1m) requires.

Since it seems that the court did in fact consider the disparity in the parties' incomes, I can't see that explicitly adding that language to s. 767.25 (1m) (b) will change anything, or that *Luciani* would have come out any differently if the added language had been there when the case was decided. It seems to me that to overrule *Luciani* something more direct is needed, such as creating a rebuttable presumption of unfairness if the payer's income is much less than the payee's.

4. The drafting instructions say to add a legislative note explaining that the purpose of the statute change is to overrule *Luciani*, and I have mentioned the *Luciani* case in

the analysis. Unless the statutory language is considered ambiguous, however, a court will not look beyond the language to outside sources, such as the legislative history, including the analysis of the bill that became the act, for help with interpreting the language.

5. It is not clear to me whether the proposed “standard of living” language (in s. 767.25 (1m) (b)) is intended to refer to the standard of living of the parties at the time support is ordered or the standard of living that will result *after* support is ordered? Interpretation would be left to a court’s discretion. Most of the other factors in s. 767.25 (1m) relate to the situation at the time support is ordered, unaffected by that order. In the *Luciani* case, requiring Mr. Luciani to pay support based on the percentage standard without modification resulted in a lower standard of living for him and a greater disparity in their standards of living *after* the order. Perhaps requiring the court to consider the standards of living and any disparity that will result *after* support is ordered would better serve the intended purpose.

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